STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 5, 2001
v	No. 219808 Oakland Circuit Court
ERIC KEITH RODGERS, Defendant-Appellant.	LC No. 99-164284

Before: Doctoroff, P.J., and Holbrook and Hoekstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529; MSA 28.797, felon in possession of a firearm, MCL 750.224f; MSA 28.421(6), larceny from a motor vehicle, MCL 750.356a; MSA 28.588(1), and two counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced as a third habitual offender, MCL 769.11; MSA 28.1083, to twenty-five to fifty years' imprisonment for the armed robbery conviction, five to ten years' imprisonment for the felon in possession of a firearm conviction, five to ten years' imprisonment for the larceny from a motor vehicle conviction, and consecutive two-year terms of imprisonment for the felony-firearm convictions. He appeals as of right. We affirm.

Defendant argues that the trial court erred in admitting the prior consistent statement of his ex-girlfriend, Lisa Stephens, to the police. Defendant argues that the statement was not admissible under MRE 801(d)(1)(B), because Stephens already had a motive to lie when she made the statement. Although defendant did object to the admission of Stephens' statements to police, he did not do so on the same grounds raised on appeal. Because defendant did not object at trial on the same ground raised on appeal, this issue is not properly preserved for appellate review, and we need not address this matter unless failure to do so would result in manifest injustice. *People v Griffin*, 235 Mich App 27, 44; 597 NW2d 176 (1999). We find no manifest injustice here because any error in the admission of this evidence was harmless. After an examination of the entire record, including the eyewitness testimony of Hugh Schulkins and Constance Edwards, it is clear that the challenged testimony was not outcome determinative. *People v Smith*, 243 Mich App 657, 680; ___ NW2d ___ (2000).

Defendant also claims that he was denied his right to the effective assistance of counsel because defense counsel elicited testimony from defendant, on direct examination, that defendant

had previously been convicted of a "like offense." Because defendant did not raise the issue of ineffective assistance of counsel in the trial court, our review of this issue is limited to mistakes apparent on the record. *People v Noble*, 238 Mich App 647, 661; 608 NW2d 123 (1999).

To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced defendant that he was denied the right to a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). To establish prejudice, the defendant must show that there was a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Johnson*, 451 Mich 115, 122; 545 NW2d 637 (1996). The defendant must also overcome the presumption that the challenged action might be considered sound trial strategy. *Toma*, *supra* at 302. Decisions regarding what evidence to present are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel or assess counsel's competence with the benefit of hindsight. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

It is apparent from our review of the record that defense counsel's conduct was a matter of trial strategy. We presume that by eliciting testimony that defendant had not committed a "like offense" for over twenty years, defense counsel was attempting to refute Lisa Stephens' testimony that defendant owned a shotgun and used it to rob people, and defendant has presented nothing to overcome this presumption. *Rockey*, *supra* at 76. Moreover, even if defense counsel's conduct could not properly be characterized as trial strategy, defendant did not establish how he was prejudiced by the conduct. In light of the overwhelming evidence of defendant's guilt, defendant failed to show that there was a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Johnson*, *supra* at 122.

Lastly, defendant claims that the trial court abused its discretion by excluding the "statement against interest" made by defendant's brother Melvin Rodgers. The trial court ruled that the statement allegedly made by Melvin Rodgers was inadmissible under MRE 804(b)(3), because there were "no corroborating circumstances as to the trustworthiness of the statement." We find no abuse of discretion in the trial court's decision to exclude the statement. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

In *People v Barrera*, 451 Mich 261, 268; 547 NW2d 280 (1996), our Supreme Court stated that, when evaluating a trial court's decision to admit or exclude a statement against penal interest offered under MRE 804(b)(3), four factors should be considered: "(1) whether the declarant was unavailable, (2) whether the statement was against penal interest, (3) whether a reasonable person in the declarant's position would have believed the statement to be true, and (4) whether corroborating circumstances clearly indicated the trustworthiness of the statement." At issue in this case is whether corroborating circumstances clearly indicated the trustworthiness of the statement.

Statements which are totally lacking in corroboration are not admissible under MRE 804(b)(3). *Barrera*, *supra* at 277. Factors favoring admissibility are whether the statement was (1) voluntarily given, (2) made contemporaneously with events referenced, (3) made to family, friends, colleagues, or confederates, i.e., to someone to whom the declarant would likely speak the truth, and (4) uttered spontaneously at the initiation of the declarant and without prompting or

inquiry by the listener. *Id*. at 274. On the other hand, factors favoring a finding of inadmissibility include whether (1) the statement was made to law enforcement officers or at the prompting or inquiry of the listener, (2) the statement minimizes the role or responsibility of the declarant or shifts blame to the accomplice, (3) the statement was made to avenge the declarant or to curry favor, and (4) the declarant had a motive to lie or distort the truth. *Id* at 274-275.

We believe that the trial court properly determined that the statement allegedly made by Melvin Rodgers lacked corroborating circumstances indicating its trustworthiness. Although the statement was made to a family friend, there is no indication that it was uttered spontaneously and without prompting or inquiry. Additionally, the statement was made approximately three months after the charged robbery, not contemporaneously with the events referenced. Further, McGhee testified that he really could not remember what Rodgers told him and that he was "not totally sure about some of this stuff," and this lack of specificity suggests untrustworthiness. The fact that McGhee originally claimed that Rodgers told him he "fixed" defendant in September or October 1998, weeks prior to when the actual crime occurred, further indicates that the statement was untrustworthy. Additionally, according to McGhee, both men were "high" when the statements were made. Lastly, McGhee admitted that he is a known liar, having been convicted of approximately twelve crimes involving theft or dishonesty, and his lack of credibility further diminishes the trustworthiness of the statements. Under the totality of the circumstances, the trial court did not abuse its discretion in determining that the alleged statements made by Rodgers were not sufficiently trustworthy to be admissible under MRE 804(b)(3).

Affirmed.

/s/ Martin M. Doctoroff
/s/ Donald E. Holbrook, Jr.
/s/ Joel P. Hoekstra